United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1306 ORIGINAL

B

P/S

In The

United States Court of Appeals

For The Second Circuit

AH LOU KOA,

Plaintiff-Appellant,

vs.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Defendant-Respondent.

On Appeal from a Judgment of the United States District Court for the Southern District of New York.

BRIEF FOR PLAINTIFF-APPELLANT

ABRAHAM E. FREEDMAN
Attorney for Plaintiff-Appellant
346 West 17th Street
New York, New York 10011
(212) 929-8410

HERBERT ZELENKO
Of Counsel

(7370) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N. J. (201) 257-6850 | New York, N. Y. (212) 565-6377 | Philadelphia, Pa. (215) 563-5587 | Washington, D. C. (202) 783-7288

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

In The

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 74-1306

AH LOU KOA

Plaintiff-Appellant,

vs.

AMERICAN EXPORT ISBRANDTSEN LINES INC.,

Defendant-Respondent.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

Preliminary Statement

This is an appeal from a judgment rendered in favor of the defendant in the United States District Court for the Southern District of New York, Cannella, J. presiding, on the 7th day of February, 1974. The decision below is not officially reported.

Questions Presented on Appeal

1. Was it not reversible error for the trial Court to dismiss the Jones Act cause of action for negligence in this

seaman's action for injuries at the conclusion of plaintiff's case on the ground of insufficient notice of an unsafe condition or unsafe place to work?

2. Did the trial Court exceed the bounds of fair comment on the evidence in its charge to the jury and thus deprive the plaintiff of a fair trial?

Statement of Facts

This is an action pursuant to the Jones Act and the general maritime law tried to a jury on the issue of liability only. Plaintiff testified he was employed as a crew pantry man (22A) (49A) aboard defendant's vessel, the S.S. Export Champion although listed as a messman (49A).* It was his job, among others, to help prepare the evening meal for the crew. For the entire day on January 18, 1971 the ship had been rolling in rough seas (23A, 164A, 199A). At about 4 P.M. on that day plaintiff began to get salads ready for the crew. To do this, it was necessary for him to work at a serving table which was affixed alongside a wall. Just above this table was an opening from the galley where the food could be passed through to the messroom.

Because of the rough weather it was necessary for the plaintiff to brace himself against the serving table (28A, 67A) and to hold a large salad bowl with his left hand while ladling out the salad with a spoon with his right hand to individual bowls. There was no mat on the deck under the serving

* All page references are to the Joint Appendix unless otherwise specifically indicated.

table (33A, 207A). While plaintiff was doing this work and had filled a number of individual bowls over a period of seven or eight minutes (64A), his superiors, the Chief Steward Milton and Cook Eley, were present, sitting at the crew table some distance from plaintiff (38A), whose back was to Milton as he worked (141A). All of this time the ship had been rolling because of the rough weather (156A, 67A, 197A). Suddenly there was a rush of water under his feet (28A, 52A) causing him to fall to the deck. He slid across the room on his knees to the pantry, where he was picked up by some of the people in the room. This happened about 4.30 P.M. (23A).

Plaintiff further testified that the room was mopped only in the morning at about 10 A.M. He said further that it was not his job to mop the messroom floor, but only to do so in the pantry (34A). When water is on the deck it is difficult to see because it is the same color as the tile (59A).

During rough weather water from a drinking fountain spilled over on the room deck from time to time when used for drinking or filling pitchers (35A-37A).

In addition, plaintiff testified that from the time he started to work until the accident, no one told him to stop work even though his superiors, the Chief Steward and Cook were in the room (40A, 66A-67A, 218A-220A).

At this point it is to be noted that plaintiff, of Chinese extraction (20A) and a citizen of the United States since 1964 (19A) has great difficulty with the English language. His pre-trial deposition was taken with the assistance of an interpreter (17A). At the trial an interpreter was used (13A-15A). He testified that he can do little more with English than his name and address, that on getting his citizenship he was not asked to read (41A-42A). Even the Court noted that many ethnic groups upon acquiring citizenship revert to their original language and background and have trouble with English (42A-43A). During the course of plaintiff's testimony which was given partly in English and partly through the interpreter, it was evident that plaintiff truly had difficulty with the language. The Court itself noted at many points in the testimony that plaintiff did not understand English too well (17A, 31A-32A, 44A, 46A, 70A, 81A-83A).

The matter of the plaintiff's language difficulty assumed vital importance in this case for when the vessel arrived in New York on March 15, 1971, plaintiff signed his name to a paper, Exhibit (B) (75A) which in effect exculpates defendant from any liability in the case and directly contradicts plaintiff's testimony. His brother who was present to meet him also signed his name. The plaintiff testified that he signed this paper for the"insurance man"and that he was told to do so.

He did not read it; he could not read it and neither could his brother, and that it was not read to him. He also said that he told the"insurance man""that the deck was wet not dry" (77A-85A).

Ning Lou Koa, plaintiff's brother, a cook in a Chinese restaurant, testified that he signed Exhibit B witnout reading it and that it was not read to him (88A). Plaintiff's brother, although a citizen, also has difficulty with English, as the Court noted (90A-92A). This witness also testified that plaintiff had told the person who took the statement (Exhibit B) that deck was wet (94A). This witness said he does not read English (96A). At the conclusion of plaintiff's case the Court granted defendants' motion to dismiss the Jones Act negligence cause of action on the ground that defendant had no notice constructive or actual of the unsafe place to work (97A-99A), despite the presence of plaintiff's superiors prior to and at the time of the accident and the question of fact as to whether plaintiff had heard the Steward's warning to sit down. This ruling by the Court was opposed by plaintiff.

The defendant then produced as a witness. John Anduiza, the person who wrote out Exhibit B. He is now an attorney, but in 1971 he was only an investigator, working for defendants' attorneys. His job at that time was to meet the vessel and interview those seamen who had been listed as ill or injured (101A).

Anduiza conceded that the plaintiff had difficulty with the English language. Anduiza further testified that he was not sure that the plaintiff could read Exhibit B. Thereupon, Anduiza read it to the plaintiff (102A-103A). The witness then said that plaintiff's brother also had difficulty with English (111A-120A). He also needed the interpreter as noted by the Court (90A-92A).

Anduiza said further that one of the purposes on interviewing Koa was to protect the defendant against any possible future claim (109A). He was an experienced investigator but he was not there to protect the plaintiff (116A). Anduiza further noted that the plaintiff's language difficulty extended also to his handwriting in Exhibit B (122A).

Despite the evidence from both sides affirming the English language difficulty of plaintiff and his brother, the Court then admitted Exhibit B into evidence over objection (129A).

The deposition of Eley, the cook, was then introduced by defendant. Eley testified that the Steward had called to the plaintiff to sit down but that plaintiff did not respond (133A). The Steward was sitting in back of plaintiff. Eley did not know whether plaintiff heard the Steward (141A-143A). Eley saw water on the deck and it was there every time the men drink (146A). The deck was mopped in the morning (147A). Eley did

not inspect the deck as to dryness (151A). He saw the plaintiff fall down at the table and slide across the room, with the bowl remaining on the table (152A-153A). There was nothing to provide a hold for the plaintiff who had to do his job the best he could under the rolling and rough conditions (157A).

Samuel Milton, the Steward, testified that the weather was very rough on the day of the accident (164A) and that as he came in about 4 P.M., the cook, the plaintiff and another messman were present. The salad bowl, about 5 gallon size, was brought in by the second cook and placed in the breadbox because of rough weather (172A-174A). On such a day six salads are set on the serving table, and then picked up by any crew member who wants one (175A). He told plaintiff to sit down after he had prepared the six dishes because it was too rough (200A). Plaintiff told him he wanted to make two more after this (175A-176A). The plaintiff fell as he reached for two more dishes as there was nothing to hold onto (176A-177A). All the others were sitting while plaintiff was working. Further, that as plaintiff flew across the room, the salad bowl remained in his hands and his body hardly touched the floor 187A-188A). He also testified that plaintiff does not speak good English, only enough to understand (192A). The ship was

rolling hard while plaintiff was working on the salads but not as hard as when he fell (196A). It took plaintiff about 3 or 4 minutes to fill the salad bowls (198A). Although the weather was rough, once the plaintiff started on the salad, the Chief Steward let him finish (203A-204A, 217A). There were no handholds or other device or mat under the serving table, nor any under the water fountain (206A-208A). In rough weather, water would sometimes spill out of the water fountain (208A).

Milton also testified that he is responsible for the safety and safety procedures of the men working under him (203A).

Thus, with the conflicting claims as to the water on the deck, and the question as to whether plaintiff understood, or was able to read Anduiza's handwriting and English in Exhitit B, the damaging and disputed statement taken by defendant's investigator, the jury with a proper charge would have been properly permitted to return a verdict for either party.

However, the Court's charge, particularly those argumentative portions which urged the good character of the defendant and its investigator and with the lack of motive of defendant's witnesses to lie or at least be adverse to the plaintiff and which made statements of "fact" not in evidence affected the substantial rights of the plaintiff and requires a new trial.

The Court charged among other matters, as follows:

> "It's very well in argument, for example, to say well, now, this fellow went up there to take a statement from you, do you think he went up there to protect the defendant? He was not obliged by the company to go there and make an investigation. Is there anything sinister or nefarious about a company trying to protect its rights in getting statements after the accident happened when the memories are fresh so that they can have accounts of it?
>
> "You would assume from that that everyone is a crook and he is going to go up there to get a statement to trip him up, so he can hurt him in some way. Sailors sail on these ships all the time and they sail on them from year to year, and the company needs sailors as much as the sailors need the company. Do you think a company would last very much in business if they went around taking statements from people and in effect putting them out of court if they had a proper claim. I suppose it could happen, I don't know." (232A-233A)

The Court in the foregoing excerpt from its Charge, argumentatively attempted to picture the defendant as conducting an impartial investigation of the accident, despite the testimony of Anduiza, the defendant's investigator, to the contrary when he stated that one of his purposes was to protect the defendant against any possible future claims (109A). He was not there to protect the plaintiff (116A-117A). Additionally,there was no evidence upon which the jury could fairly decide the issues of fact based on the court's rhetorical question in the foregoing as to whether the defendant could remain in business if it took statements from claimants which would put them out of court if they had a proper claim.

The Court's charge continues in a slanted and argumentative vein:

> "On the other side of the coin, Anduiza, he was an investigator, he has since become a lawyer,well, this is a fact for you to consider, whether a fellow who's got a career to go on and is now presently a lawyer is going to go around and do his kind of thing, put words into mouths of somebody who never said that at all. These are judgments for you to make." (233A-234A)

The foregoing excerpts from the charge which gives its seal of approval to the activities of an investigator, now became an attorney, again attempts to argue from "facts" not in evidence, to wit: the state of mind of Anduiza and his good character at the time he took Exhibit B. This, despite Anduiza's testimony that he was out to protect the company.

Further, in the charge the Court states:

> "Of course, the cook and the steward are fellow employees of the plaintiff. They come out of the same union hall. So that you consider their interest as company employees and also their interest as fellow colleagues who work with him.
>
> "There has been no showing here that I am aware of that there were any fights between any of these witnesses and this plaintiff. There is some evidence they went for a beer one time when he went to get medical treatment and..." (234A)

Here again the Court injects "facts" that are not in evidence to eliminate from the jury's consideration any motive for lying or acting adversely to plaintiff's interests.

There is no evidence that Steward Milton or cook Eley were members of the same union or came out of the same union hall as plaintiff or that they were his fellow colleagues. The only evidence as to their relationship with plaintiff was that they were his superiors or bosses (135A, 160A).

In addition the Court indicates in the foregoing that lack of evidence as to fights between Milton, Eley and the plaintiff must in some way be considered, by inference as a lack of motive for Milton and Eley to act adversely to plaintiff. This, despite the testimony by Milton that he was responsible for plaintiff's safety and safety procedures in his department (203A). All of the foregoing was properly excepted to (244A-245A).

ARGUMENT

Point I

THE DISTRICT COURT ERRED IN DISMISSING THE JONES ACT CAUSE OF ACTION FOR NEGLIGENCE AT THE CONCLUSION OF PLAINTIFF'S CASE. THIS RULING IS CONTRARY TO THE HOLDING OF THE SUPREME COURT IN ROGERS v. MISSOURI PACIFIC RAILROAD, 352 U.S. 500 (1957)

It is fundamental that the rules applicable to Federal Employer's Liability cases are applicable to suits brought pursuant to the Jones Act, Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521 (1957). In Rogers v. Missouri Pacific R.R., 352 U.S. 500 (1957) an FELA case, the Supreme Court held that the requirement of proximate causation is satisfied if the jury may find that the employer's negligence played "any part, even the slightest" in causing the injury. In the same case, at a later point the Court stated that if the employer's negligence "played any part at all" and "played any part, however small" the requirement of proximate causation is satisfied. Said the Court, 352 U.S. at 506-508:

> "Under this Statute, the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence, played any part, even the slightest, in producing the injury or death for which damages are sought.....Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that the negligence of the employer played any part at all in the injury or death.

> "....The employer is stripped of his common law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit." (Emphasis added) Footnote omitted)

It is also elementary that a shipowner is negligent if it knew of or should have known of a dangerous condition which is reasonably likely to cause injury and does not exercise the care which a reasonably prudent man would have exercised under the circumstances.

Gutierrez v. Waterman SS Co., 373 U.S. 206, 83 Sup. Ct. 1185 (1963).

Ferguson v. Erie RR Co., 235 F. Supp 72, 76 (1964).

With his superiors present during exceedingly rough weather with the ship rolling, plaintiff, in order to do his work in filling salad bowls, was required to stand, bracing himself against the serving table with his hands occupied in holding a salad bowl and a ladle (28A, 67A, 175A-178A, 195A-198A). There were no safeguards of any kind to prevent a fall, neither a mat under foot, nor hand holds of any kind (206A-208A).

According to the plaintiff, he was in the aforesaid position for about 8 or 10 minutes before the accident (64A). According to Miller, the Chief Steward, he was in that position for about 3 or 4 minutes (198A).

The plaintiff had a right to assume that he was to continue with his work, despite the conditions, because of the presence of his superiors, who were watching him. That plaintiff was in an unsafe place and in danger during this period of time was within the actual knowledge of the defendant (Steward Milton). This comes from Milton's own testimony that only because plaintiff had started his task (to fill 6 salad bowls) did he allow him to finish and only then called to him to sit down (203A-204A,17A).

Unless plaintiff's danger was known to the Chief Steward and so recognized by him, there would be no reason to order plaintiff to sit down before the accident. This order was even given without any relation to water on the deck.

The fact that plaintiff denied having heard the order to sit down (40A, 66A-67A, 218A-220A) does not remove the fact of actual notice to the defendant of an awareness of danger to the plaintiff. This actual knowledge on the part of the defendant of plaintiff's danger takes on added significance because Milton was also in charge of safety and safety procedures at the time and place of the accident (203A).

Thus, there was sufficient evidence on both sides from which the jury could have determined whether under the circumstances there was actual notice to defendant and whether such notice was adequate either in time or by the means used of calling the plaintiff.

Whether the plaintiff heard the warning to sit down (which he denies) was a jury question which would go only to contributory negligence.

Under the Rogers case, there was clearly a jury question on negligence. The trial court acted erroneously in dismissing this count on the basis of no notice to the defendant or defendant's lack of time to correct the condition if it knew about it.

The Trial Court's statement as to the basis of its ruling was in direct contradiction to the evidence of the defendant, which tacitly admitted actual notice, (the order to the plaintiff to sit down) and defendant's further testimony that it permitted the plaintiff to keep on working under the circumstances only because he had started his work and defendant wanted it completed. Whether defendant had enough time to act was a question of fact for the jury. The jury could have found that it did act but not in a reasonable time or manner.

The deprivation of plaintiff's Jones Act remedy by the Trial Court was a substantial error. Permitting the

plaintiff to work in rough weather under the circumstances of this case, with an awareness and actual knowledge of danger to plaintiff by his superiors who were responsible for his safety could well have permitted the jury to find negligence without finding the vessel unseaworthy.

In Earles v. Union Barge Line Corp., 486 F.2d 1097 (1973) CCA 3 at page 1104, the Court said:

> "The duty of the vessel owner to furnish a reasonably safe place for a seaman... to perform his chores is clearly a duty of care, the breach of which results in liability for negligence where the breach proximately causes injury to a foreseeable person. The breach of the duty to use reasonable care to provide a safe place to work, does not necessarily result in unseaworthiness."

The jury could have found negligence based on plaintiff's working in an unsafe place under the conditions that prevailed, without regard to his testimony that the roll of the ship caused water to come under his legs and made him fall. It is sufficient for a jury question here, that the defendant, recognizing the potential danger to the plaintiff because of rough weather before he began his task permitted or tacitly directed him to work until his job was completed. The water only appeared as a result of the continued rolling of the ship and was but an added and concommittant cause of the accident. Plaintiff did not restrict his theory of the

accident to water alone but included the unsafe working conditions based upon the rough weather and presence of his superiors at and prior to the time of the accident (9A-10A).

Thus, under the facts of this case, the plaintiff had a substantial right to have the jury decide this case under Rogers' rule if his employer's negligence contributed even in the slightest degree to his injury.

POINT II

THE DISTRICT COURT DEPRIVED THE PLAINTIFF OF A FAIR TRIAL BY EXCEEDING THE BOUNDS OF FAIR COMMENT IN ITS CHARGE TO THE JURY WHEN IT INJECTED "FACTS" NOT IN EVIDENCE AND ARGUED THE GOOD CHARACTER OF THE DEFENDANT AND ITS WITNESSES TO THE JURY.

There is no question that the trial judge in a federal court may summarize and comment upon the evidence and inferences to be drawn therefrom in his discretion.

U.S. v. Tourine 428 F.2d 865 (1970) CCA 2

However, in Tourine at page 869, this Court placed the following limitation on such comments:

> "So long as the trial judge does not by one means or another try to impose his own opinions and conclusions as to the facts on the jury and does not act as an advocate in

advancing factual findings of his own, he may decide what evidence he will comment on."

See also Quercia v. U.S. 289 US466,469 53S. Ct. 698, 699 (1933), where the Court said:

"In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence but he may not either distort it or add to it."

At page 470:

"Deductions and theories not warranted by the evidence should be studiously avoided."

In Buchanan v. U.S. 244 F.2d 916, (1957) CCA6 at 920 the Court said:

"Where the trial judge undertakes to sum up and comment on the evidence and his comments are in the nature of an argument to the jury, he thus assumes the role of an advocate; and this is error, as established by repeated decisions."

The foregoing legal precedents form the basis of plaintiff's appeal in regard to the trial court's charge.

The plaintiff's difficulty with the English language was a major factor at the trial. An interpreter was required (13A-15A). Plaintiff had little or no understanding of reading or writing English (77A-85A). This was true also of his brother, Ning, who was a witness (90A-92A, 96A). The Court recognized the problem during the trial (17A, 31A-32A, 44A, 46A, 70A, 81A-83A). Even the defendant and its witness, Anduiza, acknowledged it (102A, 103A).

If the jury believed that Exhibit B was taken fairly and fully understood by the plaintiff, then there was no question but that he lacked veracity and his case was seriously damaged. On the other hand, if the jury believed that the defendant and its attorneys' investigator, Anduiza, took advantage of the plaintiff's illiteracy and trust and that plaintiff did not understand what he signed, defendant's case could be shattered.

The admission into evidence of this paper was vigorously contested and objected to (129A).

Yet the trial judge, despite the acknowledged language difficulty of the plaintiff in at least three instances, usurped the jury's function to decide the facts as to Exhibit "B's" probity, fairness and the circumstances under which it was signed.

This, the trial court did by its prejudicial injection of 'facts' not in evidence, and by its argumentative comment in the charge. The court argued as to Anduiza, who took the statement,(apparently in response to plaintiff's summation that Anduiza was protecting the defendant;)

> "It's very well in argument, for example, to say well now, this fellow went up there to take a statement from you, do you think he went up there to protect the defendant? He was not obliged to go up there to protect the defendant." (232A)

First of all the foregoing was clearly argumentative. Secondly, it was contrary to defendant's own evidence. Anduiza testified that he was out to protect the defendant when he interviewed the plaintiff (109A) and not to protect the latter (116A-117A). The Court's remarks at this point were an obvious distortion of the evidence.

The Court continued its comment in an advocate posture:

> "Is there anything sinister or nefarious about a company trying to protect its rights in getting statements after the accident happened when the memories are fresh so that they can have accounts of it?
>
> "You would assume from that that everyone is a crock and he is going to go up there to get a statement to trip him up, so he can hurt him in some way. Sailors sail on these ships all the time and they sail on them from year to year, and the company needs sailors as much as the sailors need the company. Do you think a company would last very much in business if they went around taking statements from people and in effect putting them out of court if they had a proper claim. I suppose it could happen, I don't know." (Emphasis supplied) (232A-235A)

The foregoing excerpt from the charge, at the very least was a good character and business reference on the ethical practice of the defendant in producing statements relative to accidents. There was no evidence on this subject at the trial.

The Court did not point out to the jury that the statement from plaintiff was not taken by the defendant but by

the defendant's attorneys, who are diligent advocates and whose investigator, Anduiza, was at the injured plaintiff's side when the ship docked (101A-102A). This, at a time when there was not even an inkling of a lawsuit.

However, the defendant was still in business at the time of the trial, thus the Court's argument by rhetorical question to the jury led to the inescapable inference that one of the reasons for its survival in commerce was its fairness in obtaining reports of accidents.

The court apparently did intend to refute some of plaintiff's claims in his summation, for immediately following the above excerpt, it continued:

"Mr. Zelenko argues that....." (233A)

Further along in the charge, the following statement was made by the Court:

> "On the other side of the coin, Anduiza, he was an investigator, he has since become a lawyer. Well, this is a fact for you to consider, whether a fellow who's got a career to go on and is now presently a lawyer is going to go around and do his kind of thing, put words into mouths of somebody who never said that at all. These are judgments for you to make. (233A-234A)

The above is another example of the trial court's advocacy of the good character of the defense in the case.

A serious question for the jury was the circumstances of taking the statement on March 15, 1971, and whether Anduiza was acting in a non-partisan capacity or for the defendant.

Whether at that time he intended to become an attorney and subsequently did so, was not an issue. How the court could inject Anduiza's state of mind as to his future on the day he took the statement was far beyond fair comment. There was no evidence that on that day Anduiza had any intention of becoming a lawyer but there was evidence that he was acting for the defendant (109A) and not the plaintiff (116-117A). It is interesting to note at this point that Anduiza testified he had language difficulty with the plaintiff and that even though Exhibit B states that the plaintiff read it, Anduiza testified that plaintiff did not read it but that he, Anduiza, read it to plaintiff (102A-103A).

The Court did not stop at the point of suggesting the good character of the defendant, its fairness and impartiality of Anduiza. It went further. It stated:

> "Of course, the cook and the steward are fellow employees of the plaintiff. They come out of the same union hall. So that you consider their interest as company employees and also their interest as fellow colleagues who work with him.
>
> "There's been no showing here that I am aware or that there was any fights between any of these witnesses and this plaintiff". (234A)

In this portion, the court, in urging lack of motive to be adversary to the plaintiff on the part of the

cook and the Steward injected the 'fact' (not in evidence) that they came out of the same union hall as plaintiff. This was a violent distortion of the evidence. There was no testimony as to this. There was evidence that they were his superiors and that the Steward was responsible for the safety of plaintiff and safety procedures at the time of the accident (203A). This evidence could easily supply an adversary motive against the plaintiff by these men for it could pin responsibility for the accident on them.

Urging "fellow colleagues" instead of superiors and the absence of fisticuffs to show a friendly relationship between plaintiff and the cook and Steward was injected. These further "facts" were not in evidence.

Thus the court in its comments in the charge not only erroneously injected statements as "facts" (which did not appear in the evidence but gave good character and reputation background as to the defendant and its investigator, Anduiza, without any basis in the testimony therefor. Its errors were compounded when it injected "facts" in regard to the cook and Steward. All of this was properly excepted to (244A-245A).

Even if the court had admonished the jury that it was not bound by the Court's comments (which did not take place at this point) it is difficult to conceive that such a warning would have dispelled the forceful and pointed prejudicial remarks by the Court.

In any event informing the jury that a Court's comments are not evidence is not the equivalent of advising it that it is not to be bound by the Court's views on the facts.

The Court's comments concerning which complaint is made, not only suggested that defendant's motives and credibility were worthy of belief (despite no basis in the evidence), but surely had the effect of destroying plaintiff's case.

It is respectfully urged that the charge of the Court below by reason of its advocacy and injection of 'facts' not in evidence on the vital question of Exhibit 'B' and the other matter referred to hereinabove deprived plaintiff of a fair trial and was not in accordance with the standards of Quercia, Tourine and Buchanan .

CONCLUSION

For the reasons set forth above the judgment of the Court below should be reversed and the action remanded for a new trial.

Respectfully submitted,

ABRAHAM E. FREEDMAN
346 West 17th Street
New York, N.Y. 10011.
Attorney for Plaintiff-Appellant.

Of Counsel

Herbert Zelenko

A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC.

U.S. COURT OF APPEALS-SECOND CIRCUIT

AH LOU KOA,

Plaintiff-Appellant,

against

AMERICAN EXPORT,

Defendant-Appellee.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, James Steele, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York

That on the day of August 1974 at 1 State St. Plaza, New York

deponent served the annexed Appellants' Brief upon

Haight, Gardner, Poor & Havens-Attorney for Def.-Appellee

the in this action by delivering 2 true copies thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

James Steele

Print name beneath signature

JAMES STEELE

Sworn to before me, this

day of August 1974

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975